U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 21 2010

SRC 06 202 52182

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed with a finding of material misrepresentation.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that he had created or would create at least 10 new positions at the preexisting [redacted] On appeal, the petitioner asserts that he has added five new jobs and would hire an additional eight in 2007 and 2008.

On February 3, 2009, this office advised the petitioner of derogatory evidence revealing that the petitioner had never purchased [redacted] as claimed. We specifically notified the petitioner of our intent to dismiss the appeal and enter a formal finding of willful misrepresentation of a material fact based on this information. The petitioner was afforded 30 days in which to respond. As of this date, more than 16 months later, we have received nothing further. Thus, in addition to the director's concerns, we find that the petitioner has not demonstrated any investment and, thus, has willfully misrepresented material facts.

The AAO conducts appellate review on a *de novo* basis. AAO's *de novo* authority is well recognized by the federal courts. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petition was filed after November 2, 2002, the petitioner need not demonstrate that he personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the business is "new" as defined at 8 C.F.R. § 204.6(e) and the creation of 10 new jobs within two years.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent

residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an alleged investment in a business, [redacted] which the alien claimed to be operating as a sole proprietor. The petitioner submitted an April 10, 2006 asset purchase agreement for the purchase of [redacted] between himself and [redacted]. The petitioner also submitted a credit advice purporting to show a transfer of $1,220,000 to [redacted], the settlement statement, the bill of sale and the business license issued to the petitioner on behalf of [redacted]

The business is not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $1,000,000.

On February 3, 2009, the AAO issued a notice of derogatory information and notice of intent to dismiss the appeal and enter a formal finding of willful misrepresentation of a material fact. The notice advised the petitioner of the following information.

[redacted] (accessed January 15, 2009 and incorporated into the record of proceedings) indicates that the business is now jointly owned by two other individuals, [redacted] and [redacted]. A news article in the Falls Church News (available at [redacted] accessed January 22, 2009 and incorporated into the record of proceedings) indicates that [redacted] sold the business to three of his employees, [redacted] and [redacted] (none of whom is the petitioner) in July 2006, three months after you allegedly bought the business. The annual reports for [redacted] downloaded from the Virginia Clerk's Information System, accessible at http://www.scc.virginia.gov/clk/bussrch.aspx, (accessed by this office January 22, 2009 and incorporated into the record), reveal that the corporation is still active and that [redacted] began signing the reports in 2007 and that [redacted] had taken over as president by April 4, 2008.

On December 4, 2008, the AAO contacted [redacted] by phone. [redacted] confirmed that he, [redacted] and [redacted] own all of [redacted], which runs [redacted]. He subsequently confirmed this information in writing by facsimile. Thus, the credit advice purporting to show a transfer of $1,220,000 to [redacted], the asset purchase agreement, the settlement statement, the bill of sale and the business license issued to you on behalf of [redacted] are all suspected fraudulent.[1]

[1] While not noted in our February 3, 2009 notice, further review of the record reveals that the signatures of [redacted] on the asset purchase agreement and settlement statement are visible and significantly different from an authentic example of [redacted] signature on the corporation's 2005 Annual Report downloaded from http://www.scc.virginia.gov/clk/bussrch.aspx. While an alleged Notary Public also signed the settlement statement and the bill of sale attesting to the signatures of the petitioner and [redacted], the document contains no notary seal or stamp, only a stamp that states: "My Comm. Exps. May 3, 2009." A notary stamp "typically includes the notary's name, the state seal, the words "Notary Public," the name of the county where the notary's bond is filed, and the expiration date of the notary's commission." Black's Law Dictionary 1085 (7th ed. 1999). While Virginia law did not require a seal prior to July 1, 2008, the Notary

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Moreover, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Id.* at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* As such, the AAO advised the petitioner that he could not overcome the above findings simply by offering a written explanation. We further advised that we will obviously not accept any photocopied documentation or letters as evidence to overcome the above derogatory information. We noted that, pursuant to the regulation at 8 C.F.R. § 103.2(b)(5), we have the discretion to request the originals of any photocopies submitted.

As stated above, the petitioner did not respond to the February 3, 2009 notice within the 30 days granted. Thus, the petitioner has not established, through the submission of credible evidence, that he has invested any money through the purchase of [redacted] as claimed.

Under Board of Immigration Appeals (BIA) precedent, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

The petitioner's ownership of and investment in [redacted] is critical to whether or not he seeks to enter the United States to engage in a new commercial enterprise in which he has made a qualifying investment pursuant to section 203(b)(5)(A)(i) of the Act. As will be discussed below, the issue of whether the petitioner purchased [redacted] also impacts whether the petitioner will create any new employment pursuant to section 203(b)(5)(A)(ii) of the Act. As such, the issue of whether the petitioner purchased [redacted], the new commercial enterprise identified on the Form I-526 petition is fundamental to the classification sought and, thus, material to his eligibility.

EMPLOYMENT CREATION

The regulation at 8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
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> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10)

Public's name does not appear in print and the signature is illegible. Thus, the Notary Public's commission cannot be verified.

> qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part:

> *Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.
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> * * *
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> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit U.S. Citizenship and Immigration Services (USCIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho,* 22 I&N Dec. 209, 213 (Comm'r. 1998). Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

On the Form I-526, the petitioner indicated that there were seven employees at the time of his investment, 12 at the time of filing and that he would create an additional seven to nine jobs. The petitioner submitted a June 1, 2006 business plan that projected 12 employees as of May 2006, 18 as of 2007 and 21 as of 2008.

On August 9, 2006, the director requested U.S. tax returns and Internal Revenue Service (IRS) Forms W-2 wage and tax statements for [redacted], for 2003, 2004 and 2005. In response, the petitioner submitted unsigned copies of IRS Form 1120 U.S. Corporation Income Tax Returns purportedly filed by [redacted] but no Forms W-2. In addition, the petitioner submitted a new copy of the Business Plan, also dated June 1, 2006 but containing an expanded discussion of employment projections. The expanded discussion indicates that the petitioner had hired five individuals and planned to hire an additional eight employees in 2007 and 2008.

On January 4, 2007, the director issued a notice of intent to deny noting that the petitioner had not submitted the requested Forms W-2 and that the wages paid by the corporation in 2004 and 2005 reflected "a healthy company with numerous employees." The director concluded that the business plan did not explain the need for additional employees, such as through a projected expansion. In response, the petitioner submitted a list of five employees allegedly hired after April 2006 and an employment plan for 2007 and 2008, including the claim to have hired one individual in 2007. The petitioner also submitted the following number of IRS Forms W-2 purportedly issued by [redacted]: 9 in 2003, 11 in 2004 and 12 in 2005. Finally, the petitioner submitted the corporation's 2003 unsigned tax return.

The director concluded that the petitioner had not established how he intended to create at least 10 new jobs in addition to the twelve that existed in 2005.

On appeal, the petitioner submitted several lists of employees for several dates in 2005 and 2006 and a letter purportedly from [redacted] asserting that five employees "were either laid off or quitted [sic]" during 2005.[2] The word "quitted" appears throughout the letter. The remaining employees, however, were employed all year at [redacted] according to the Employee Lists submitted and, thus, did not replace those who left or were fired. The petitioner does not explain how, if the petitioner had purchased the business as claimed in April 2006, the replacement of employees who had recently left or were fired prior to his assumption of the business constitutes the creation of new jobs. Regardless, as discussed above, evidence has come to light revealing that the petitioner did not purchase the business as claimed. Thus, he has not created and will not create any jobs at [redacted]

In light of the above, we concur with the director that the petitioner has not and will not meet the job creation requirement.

INVESTMENT OF CAPITAL

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
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> * * *
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> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

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[2] The signature on this letter matches the alleged signatures of [redacted] on the asset purchase agreement, settlement document and bill of sale rather than the authentic example of his signature on the 2005 Annual Report downloaded from http://www.scc.virginia.gov/clk/bussrch.aspx.

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner submitted the abovementioned credit memo purporting to document the transfer of $1,219,982 from the petitioner to [redacted] for the purchase of [redacted], which he claimed to operate as a sole proprietorship. The petitioner, however, has not rebutted the information discovered by the this office, enumerated above, which reveals that the corporation continues to operate [redacted] and was actually sold by [redacted] to three of his employees. Thus, we cannot consider the documentation of the sale of [redacted] to the petitioner as authentic or otherwise credible.

In light of the above, the petitioner has not established a qualifying investment of $1,000,000.

SOURCE OF FUNDS

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm'r. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1040 (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The petitioner submitted certificates purporting to document his sale of property in Korea. As stated above, however, the petitioner has not rebutted the derogatory evidence obtained by this office revealing that the evidence of the petitioner's purchase of [redacted] is fraudulent. As also stated above, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. Without a resolution of the discrepancies discussed above, none of the remaining evidence, including that purporting to document the source of the allegedly invested funds, can be considered credible.

In light of the above, the petitioner has not credibly established the accumulation of $1,000,000.

NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a *new* commercial enterprise" (Emphasis added.)

8 C.F.R. § 204.6(e) defines "new" as established after November 29, 1990.

8 C.F.R. § 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

> (1) The creation of an original business;
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> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
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> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

As stated above, the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. This amendment did not, however, eliminate the requirement that the commercial enterprise be "new." Thus, we find that 8 C.F.R. § 204.6(h) is still relevant for commercial enterprises established by the petitioner or someone else prior to November 29, 1990.

The corporate tax returns submitted reveal that [redacted] was established on May 19, 1988. While these documents are unsigned and somewhat suspect given the derogatory evidence discovered by this office and discussed above, the corporate information contained at http://www.scc.virginia.gov/clk/bussrch.aspx, also lists an incorporation date of May 19, 1988. While the petitioner asserts that he now operates [redacted] as a sole proprietorship, in determining whether a commercial enterprise is "new," we look at the employment generating entity. *Matter of Soffici*, 22 I&N Dec. at 166. Moreover, as discussed above, [redacted]. continues to exist and operate [redacted]. Thus, neither the corporation nor [redacted]

[redacted] as an employment generating entity is "new" as defined at 8 C.F.R. § 204.6(e). The petitioner has not established that he or anyone else restructured, reorganized or expanded [redacted] after November 29, 1990. Thus, the business cannot be considered "new" pursuant to 8 C.F.R. § 204.6(j)(h)(2) or (3).

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

Beyond upholding the director's decision, we are also making a formal finding of willful misrepresentation of a material fact. As stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92. In this case, we find substantial and probative evidence that the petitioner submitted falsified material in support of the petition. The petitioner signed the Form I-526 under penalty of perjury and attested that he is solely responsible for submission of evidence with this petition.

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

As discussed, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. at 447.

Finally, by filing the instant petition and submitting evidence purporting to document the petitioner's purchase of [redacted], the petitioner has sought to procure a benefit provided under the Act using fraudulent documents. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that the above documents are all fraudulent, we affirm our finding of willful misrepresentation of a material fact. This finding of misrepresentation shall be considered in any future proceeding where admissibility is an issue.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed with a separate finding of willful misrepresentation of a material fact on the part of the petitioner, [redacted]

FURTHER ORDER: The AAO finds that the petitioner, [redacted], knowingly submitted documents containing false statements in an effort to

mislead USCIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.